

2014 WL 7478758 (Ill.App. 4 Dist.) (Appellate Brief)
Appellate Court of Illinois, Fourth District

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant,

v.

Robert E. FICKES, Defendant-Appellee.

No. 4-13-1102 (Consolidated with 4-13-0736).

March 24, 2014.

Appeal from the Circuit Court of the Seventh Judicial Circuit Sangamon County, Illinois

No. 13-CF-52

Honorable Leslie J. Graves Judge Presiding.

Reply Brief and Argument for Plaintiff-Appellant

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***1 ARGUMENT**

**DEFENDANT'S INCUPLATORY STATEMENTS WERE VOLUNTARY
UNDER BOTH STATE-LAW AND FEDERAL-LAW STANDARDS.**

The following arguments are identical to the reply brief that the State filed in case No. 4-13-0736, except for changes in citations to the parties' briefs. All citations are to the record in case No. 4-13-0736.

Defendant's brief contends that his statements were involuntary under a State-law standard. (Def. br., 9) Defendant asserts that the State forfeited the specific issue of State-law voluntariness by failing to argue the point in its opening brief. (Def. br., 26-27)

However, the trial court ruled that the statements were "involuntary." (R. Vol. III, 34) The only expressed reason was that the interviewers failed to ensure that their communication with defendant, a severely hearing impaired person, had been "as effective" as talking with someone without a hearing impairment. (R. Vol. III, 34) Therefore, the trial court did not suppress defendant's statements explicitly under a State-law standard of voluntariness as opposed to the Federal due-process standard.

*2 Defendant as appellee may urge State-law involuntariness in support of the judgment, even though the trial court did not directly rule on it, if he shows that the factual basis for the point was before the trial court. [People v. Lashmet](#), 372 Ill.App.3d 1037, 1043, 868 N.E.2d 368, 373 (4th Dist. 2007) . Defendant would have waived that issue had he not argued it in his appellee brief, so it would be unfair to require the State to address the point in its opening brief. See [People v. Williams](#), 193 Ill.2d 306, 347-348, 739 N.E.2d 455, 477 (2000) (applying forfeiture rules to arguments not raised in an appellee brief).

Defendant is correct that a confession must be voluntary in a "State-law sense." [People v. Bernasco](#), 138 Ill.2d 349, 365, 562 N.E.2d 958, 965 (1990). That is, a confession may be deemed involuntary under Illinois law, absent police misconduct, based entirely on the suspect's personal characteristics. [People v. Westmorland](#), 372 Ill.App.3d 868, 876, 866 N.E.2d 608, 615 (2d Dist. 2007). Despite that gloss, the test remains whether defendant confessed freely and voluntarily, without compulsion or inducement of any kind and without his will having been overborne. [People v. Murdock](#), 2012 IL 112362, 130.

With respect to the State-law standard, defendant relies on his personal characteristics. (Def. br., 27-32) Defendant *3 cites his age, 62 years old, along with his “health issues,” with emphasis on his hearing impairment. (Def. br., 27-32) Defendant's brief provides some examples of times when he “gave illogical responses” or responded with “Huh?” (Def. br., 21-23)

The State acknowledges those instances as showing that the communication in the interview was not close to ideal and that it could have been improved with an interpreter. (R. Vol. XI, 101) After all, defendant maintained that his hearing aid did not improve his hearing 100%. (R. Vol. XI, 101) However, the State disagrees with his brief's characterization of the recording as reflecting him having extreme difficulty in communicating through spoken word using his hearing aid. (Def. br., 9-10)

Actually, the recording (P. ex. No. 3) rebutted defendant's testimony that he can “hear” only “voices, but not words.” (R. Vol. XI, 101) Defendant was able to repeat words that he heard in the interview, including “babysitting,” “punish,” “behavioral problem,” “accident,” “below the pants,” “front part,” and “unbuckle.” (R. Vol. I, C74, C83-C85, C88, C93) In his testimony, defendant did not say whether he had any ability to sight-read speech. (R. Vol. XI, 100-102) Therefore, the record does not reflect that “speechreading” *4 had been defendant's “only possible method of communication for this interrogation.” (Def. br., 29)

Defendant erroneously characterizes the trial court's ruling as “embracing” as “credible” his claim that his hearing aid did not permit him to hear words. (Def. br., 29) The trial court's factual findings neither addressed the subject of witness credibility nor specified defendant's level of ability to hear words using his hearing aid. (R. Vol. III, 34) The only finding was that defendant was “severely hearing impaired” and that the interviewers failed to make the communication “as effective” as talking with someone without a hearing impairment. (R. Vol. III, 34) Distinguishable is [Westmorland](#), 372 Ill.App.3d at 877, 866 N.E.2d at 615, where the trial court found that the witnesses were credible.

Notably, defendant's testimony (R. Vol. XI, 100-102) did not claim that he was unable to understand questions about the victim's accusations against him but that he attempted to participate by faking his way through the interview. (Def. br., 30-31) The State disagrees that the recording (P. ex. No. 3) by itself constitutes “overwhelming evidence” (Def. br., 30-31) that he was unable to comprehend the questioning even though misunderstandings were resolved as they occurred. The State's opening brief provided examples of clarifications that took place during the interview. (St. br., 21-22)

*5 Defendant does not cite the record when his brief accuses the interviewers of declining to bother to correct every “obvious” instance of miscommunication. (Def. br., 31) Defendant's brief fails to specify even one example of a miscommunication that the interviewers supposed “decided” to leave uncorrected. (Def. br., 31) These omissions from defendant's brief are striking because he touts the factor of uncorrected misunderstandings as weighing “heavily against voluntariness.” (Def. br., 31) Defendant also fails to cite authority in support of that proposition. (Def. br., 31) See [Ill. S. Ct. R. 341\(h\)\(7\)](#) (eff. Feb. 6, 2013) (requiring argument to contain the reasons for the party's contentions, with citation to authorities and pages of the record).

Defendant fails to persuade that he should be permitted to rely on alleged facts and opinions drawn from cited law review articles that generalize about the capabilities and behaviors of deaf persons. (Def. br., 14-20, 28, 30-31, 33) At the hearing on the motion to suppress, defendant never offered into evidence expert testimony regarding such matters. (R. Vol. XI, 3-105) See [Wilson v. Wilson](#), 217 Ill.App.3d 844, 857, 577 N.E.2d 1323, 1332 (1st Dist. 1991) (“A reviewing court considers only those documents and arguments which pertain to the appellate court record and disregards all extemporaneous documents and comments by either party that are *6 not supported by the record”). Moreover, courts are cautious in expanding the scope of judicial notice. [People v. Davis](#), 65 Ill.2d 157, 161, 357 N.E.2d 792, 794 (1976) (requiring noticed facts to be capable of immediate and accurate demonstration by resort to easily accessible sources of indisputable accuracy).

Defendant also challenges whether, under State law, his statement was intelligently and voluntarily made. (Def. br., 13) A confession must be knowingly and intelligently given, and intelligent knowledge is interrelated with voluntariness under Illinois law. [Bernasco](#), 138 Ill.2d at 365, 562 N.E.2d at 965. Defendant relies on a case that lacked coercion or police misconduct but involved a suspect's “[mental disability](#)” that could have deprived her of a capacity to understand the meaning and effect of

her confession. *People v. Braggs*, 335 Ill.App.3d 52, 65-66, 779 N.E.2d 475, 486-487 (1st Dist. 2002), *aff'd*, 209 Ill.2d 492, 810 N.E.2d 472 (2003). However, defendant does not suggest that the present case concerns any *mental disability* that affected his ability to understand the meaning and effect of confessing. See *People v. Slater*, 228 Ill.2d 137, 160-161, 886 N.E.2d 986, 1000-1001 (2008) (referring to whether “intellectual limitations” made the suspect incapable of making a voluntary confession).

*7 Instead, defendant asserts that a suspect cannot make a knowing and intelligent statement without adequately-understanding the language that police use to communicate. (Def. br., 14) Defendant unsuccessfully attempts to support that broad proposition by citing *People v. Daniels*, 391 Ill.App.3d 750, 791-792, 908 N.E.2d 1104, 1137 (1st Dist. 2009), where experts had explained the mentally impaired suspect's apparent understanding of her rights through her tendency to “parrot” back things without comprehension.

Defendant relies on *State v. Hindsley*, 614 N.W.2d 48, 58 (Ct. App. Wis. 2000), which required warnings pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), to be given in a language in which the suspect is proficient enough to understand the concepts. However, defendant does not argue that *Miranda* warnings had been needed in the present case.

With respect to Federal-law voluntariness, defendant cites the phrase “certain interrogation techniques” from *Miller v. Fenton*, 474 U.S. 104, 109 (1985), with emphasis on a suspect's “unique characteristics.” Condemned techniques include torture and physical abuse. *People v. Easley*, 148 Ill.2d 281, 314-315, 592 N.E.2d 1036, 1050 (1992). Other prohibited techniques from the cases cited by *Easley* without parenthetical involve brutality (*People v. Thomlinson*, 400 Ill. 555, 561, 81 N.E.2d 434, 437 (1948)), threats (*Lynumn v. United States*, 372 U.S. 528, 534 (1963)), or promises conditioned on confessing (*Haynes v. United States*, 373 U.S. 503, 514 (1963)).

It is such forms of interrogation that are considered offensive to a civilized system of justice. *Easley*, 148 Ill.2d at 314-315, 592 N.E.2d at 1050. Distinguishable is *Mincey v. Arizona*, 437 U.S. 385, 398-402 (1978), where the suspect's will was overborne because he was debilitated and barely conscious while his repeated refusals to talk without a lawyer went ignored.

Defendant does not appear to claim that his interviewers used techniques of the sort that might coerce a suspect without a hearing impairment into confessing involuntarily. Instead, defendant relies on *United States v. Sablotny*, 21 F.3d 747, 751 (7th Cir. 1994), which determined “whether a special standard of **vulnerability** is applicable to the **elderly**.”

The Seventh Circuit stated, “we are not inclined here to give special consideration to the alleged **vulnerability** of a 62-year-old, on account of age alone.” *Sablotny*, 21 F.3d at 751. However, if “**mental impairment** of whatever kind should have reasonably been apparent to the interrogators, special care should have been exercised, and a lesser quantum of *9 coercion would render the confession involuntary.” 21 F.3d at 752.

Defendant's brief recognizes that “deafness is not the same as *mental disability*.” (Def. br., 28) Defendant cites no case law authority that applies to deafness the same standards of special care and lesser quantum of coercion that apply to apparently mentally **vulnerable** suspects. (Def. br., 36) The same reasoning for requiring extra care to guard against coercion does not apply to suspects with impaired hearing. See *Jurek v. Estelle*, 623 F.2d 929, 938 (5th Cir. 1980) (“The concern in a case involving a defendant of subnormal intelligence is one of suggestibility”).

Importantly, defendant never indicated to the interviewers that he used American Sign Language, needed an interpreter, or was unable to comprehend speech. (R. Vol. XI, 9-10, 16) Detective Mayfield confirmed defendant's understanding that defendant did not have to talk. (R. Vol. I, C90) Therefore, the record does not establish that the interviewers took advantage of defendant's hearing impairment, age, or health condition to cause him to confess. (Def. br., 34)

Defendant's citations to the record do not support his claim (Def. br., 34) that the “interrogators continued to ask tight, leading questions” likely to repeat prior *10 misunderstandings. (R. Vol. XI, 10-12, 41-42) Defendant's brief does not specify any

examples. (Def. br., 34) Actually, Detective Mayfield requested defendant multiple times early on in the interview to say what happened with the victim. (R. Vol. I, C85-C87)

Detective Mayfield explained that he sometimes needed to redirect the interview back to the topic of the victim's allegations. (R. Vol. XI, 12) Defendant had admitted that the victim grabbed his hand and put it down her pants well before Detective Mayfield remarked "I don't care" in response to defendant's explanatory comment about being diabetic. (R. Vol. I, C95, C104) Defendant cites no authority that expressing disbelief in a suspect's claims is a coercive interview tactic. (Def. br., 34) Distinguishable is *Martinez v. Estelle*, 612 F.2d 173, 180 & n.4 (5th Cir. 1980), where an illiterate person had been tricked into signing a written confession that completed the elements of the crime by inserting the element of scienter that was missing from his oral statement.

Defendant fails to cite any authority on point for his claim that a violation of the Americans With Disabilities Act, if established, "should weigh heavily against voluntariness in the due process analysis." (Def. br., 34) *Colorado v. Connelly*, 479 U.S. 157, 164 (1986), holds that the police *11 conduct needs to be "causally related" to the confession for a state actor to deprive a defendant of due process. Here, defendant never claimed that he felt coerced because police refused to comply with the ADA by disregarding requests for an interpreter. (R. Vol. XI, 100-102) Cf. *Bahl v. County of Ramsey*, 695 F.3d 778, 782-783 (8th Cir. 2012) (where arrestee wrote to police before his interview, "ADA Law! must provide Interpreter," "I am deaf and use ASL. Please respect my language," and "English is my second language. More effective communication is through ASL not my 2nd language").

In any event, no "obvious violation" of the Americans With Disabilities Act occurred during the interview. (Def. br., 12) Defendant wore a hearing aid, and he never requested an American Sign Language interpreter. (R. Vol. XI, 16, 27) The interviewers thereby honored defendant's apparent choice of using his own auxiliary aid. *Bahl*, 695 F.3d at 786, quoting 28 C.F.R. § 35.160(b)(2) ("In determining what types of auxiliary aids and services are necessary, a public entity shall give primary consideration to the requests of individuals with disabilities"). The State disagrees that defendant's statements became involuntary simply as a result of the interviewers' failure to ask defendant explicitly at the outset if he preferred to communicate through an interpreter. (R. Vol. III, 34) Cf. *12 *Hindsley*, 614 N.W.2d at 59-60 (considering a person's language only insofar as it bears "on whether coercion by more subtle means, rather than by overt acts, took place").

Defendant claims that the Seventh Circuit has noted that "an interrogation can become coercive where the police 'structure their interrogation to take advantage of a suspect's impairment.'" (Def. br., 33) However, defendant misreads his cited case. The Seventh Circuit actually stated, "We apply a totality of the circumstances standard," before noting that "the district court credited the testimony of Miller and Randolph to the effect that they did not have special knowledge of Hall's condition and that in any event they did not threaten him, make misrepresentations or attempt to deceive him, or structure their interrogation to take advantage of him." *United States v. Hall*, 93 F.3d 1337 (7th Cir. 1996).

Here, Detective Mayfield testified that he would have gotten an interpreter if defendant had indicated, prior to the interview, that he could not comprehend speech. (R. Vol. XI, 9-10) The trial court did not find that the interview had been structured to take advantage of defendant's hearing impairment, only that the interviewers failed to ensure equally "effective" communication. (R. Vol. III, 34) The State's position is that defendant's statements were voluntary *13 nonetheless, because his will was not overborne. (St. br., 20-23)

*14 CONCLUSION

WHEREFORE, the PEOPLE OF THE STATE OF ILLINOIS respectfully request that the trial court's order suppressing evidence be reversed and that the cause be remanded for further proceedings.

Respectfully Submitted,

THE PEOPLE OF THE STATE OF ILLINOIS

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